No. 12,975

IN THE

United States Court of Appeals

For the Ninth Circuit

LULA J. WILSON,
Appellant,

vs.

CORNING GLASS WORKS (a corporation),
Appellee.

APPELLEE'S REPLY BRIEF.

HADSELL, MURMAN & BISHOP,
SYDNEY P. MURMAN,
RICHARD S. BISHOP,
The San Francisco Bank Building,
405 Montgomery Street, San Francisco 4, California,
Attorneys for Appellee.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Cases

Constitutions

Statutes

Texts

Rules

No. 12,975

IN THE

United States Court of Appeals

For the Ninth Circuit

LULA J. WILSON,
Appellant,

vs.

CORNING GLASS WORKS (a corporation),
Appellee.

APPELLEE'S REPLY BRIEF.

STATEMENT OF THE CASE.

The record shows that appellant sued appellee as a foreign corporation in the state Court of San Francisco on August 4, 1949. Appellee was served at San Francisco that same day inasmuch as appellee was doing business in the State of California. Pursuant to Title 28 U.S.C., Section 1446, appellee's petition and bond for removal was thereafter properly filed on August 18, 1949. Copies of the same were filed in the state Court the same day. On August 19, 1949, appellant's attorneys were served with an appropriate notice of the removal. Thereafter appellee served and filed its answer in the District Court on August 25, 1949. (R. 3-17.)

Apparently not being aware of the applicable removal procedure giving appellee a flat twenty days after service of summons issued by the state Court to petition the District Court for removal regardless of what transpired in between, appellant moved to remand this case to the state Court on August 29, 1949, contending that the removal was not timely. The grounds for this contention apparently were that on August 15, 1949, three days prior to the filing of the petition for removal, the parties hereto had stipulated to a ten day extension of appellee's time to plead. Had this occurred before Section 1446 was enacted, appellant's motion to remand to the state Court may have had merit. Consequently, as soon as appellee filed an affidavit in opposition to the motion to remand, calling the attention of appellant's attorneys to Section 1446, appellant abandoned her motion to remand the following day, September 6, 1949. (R. 17-22.) So much for the "removal" which appellant mistakenly urges as excusable neglect to make timely demand for jury trial. (A.O.B., 6-11.)

As to the facts regarding the waiver of a jury trial, the record shows that removal proceedings were completed before appellee filed its answer on August 25, 1949. As appellant discovered by her abortive attempt to remand the case, removal had been consummated a week before. This should have focused appellant's attention on the current Federal practice applicable to her case. However, appellant made no timely demand for a jury trial as required by Rule 38, Rules of Civil Procedure. In fact, it was not

until September 27, 1949, when the clerk of the Court below notified counsel that the case would receive a trial date on October 3, 1949, that appellant apparently checked the rules and found that the usual memorandum to set, required of appellant in the state Court practice in demanding or waiving a jury there was not required under Federal practice where the District Court acted on its own motion to set cases for trial. Following the Clerk's notice, appellant's attorney got busy and found that appellant had not made timely demand for a jury trial as required by Rule 38. Accordingly, appellant served a motion requesting trial by jury "due to the inadvertence and mistake of affiant as plaintiff's counsel" to not make timely demand for a jury trial in accordance with the Rule. (R. 23-26.)

Appellee opposed appellant's motion because "ignorance of the law is no excuse", and, in addition, since this was a proper case for the Court to pass upon, due, if nothing else, to the technical testimony regarding the manufacture and processing of glass products, the trial Court was urged, in the exercise of sound discretion, to deny the motion. (R. 61-69.) After hearings, and on October 10, 1949, Judge Roche denied appellant's motion (R. 26-27) with the following comments (R. 69):

> "The Court. Is the matter submitted?
>
> Mr. Johnson. Yes, your Honor.
>
> The Court. The motion will have to be denied on the record. Now, do you want to set it down for trial?
>
> Mr. Johnson. Yes, your Honor.

Mr. Bishop. Yes, your Honor. We were discussing the matter and we both agreed a date around the middle of January would be satisfactory to both sides.

Mr. Johnson. Somewhere along the middle of the month.

The Court. The 24th of January."

Subsequently, when the Master Calendar Judge assigned the case for trial, when the case was actually called for trial by the trial judge, during the four day trial thereof, when briefs were ordered by the trial judge, and when the case was finally submitted for final decision, appellant at no time mentioned trial by jury. (R. 27-33.) Had appellant proved her case, then she would have recovered judgment and trial by jury would have become moot. As it was, the record shows that after appellant had her day in Court and had failed to prove her case, requiring that judgment be entered for appellee, appellant then urged error in the refusal of the District Court to set aside her waiver of trial by jury as one of two grounds on her motion for new trial. (R. 54-56.) Due to the illness and untimely death of Judge Erskine, the trial judge, the hearing on the motion for new trial was referred to Judge Roche who reheard appellant fully on the matter of trial by jury and denied the motion on both grounds. (R. 58-60.) Then followed this appeal. (R. 60.)

ARGUMENT.

Appellee contends that there was no error in the refusal of the District Court to set aside appellant's waiver of trial by jury and, further, that appellant could not have been prejudiced because she failed to prove her case, requiring that a motion for involuntary dismissal be granted withdrawing the case from the trier of the facts.

Appellee also contends that the record shows no compelling reason in law or in fact why the Court below should have granted appellant's motion to set aside her waiver of trial by jury.

I.

APPELLANT'S CASE LACKED MERIT.

Appellant had her day in Court, in fact four days were required for the trial. She failed to prove her case. (R. 52.) Yet she says she was prejudiced by not having a jury trial and now wants a new trial because the trier of the facts who found against her was a District Judge and not a jury.

Proof of the incident of the breaking of the glass dish and the consequent injuries, both of which are substantially undisputed, consumed much less of the Court's time than proof by the parties and their experts, Messrs. Rhodes, Pask and McClellan, of the characteristics and manufacture of glass. (R. 28-31.) In ordering judgment to be entered in favor of appellee after hearing this mass of technical testimony, the

trial judge filed a helpful "Memorandum Opinion" containing a "Statement of Facts" which, among other things, included the following (R. 35-37):

> "The evidence shows that subsequent to its manufacture the bowl was placed in a carton, which was packed in a box containing several separate cartons, and that this box was shipped by train to a jobber in San Francisco. It was purchased by the jobber F.O.B. New York. Upon reaching its destination the box was unloaded into a truck, and then taken to the jobber's warehouse where it was unloaded. Thereafter, it was reloaded on a truck, delivered to the Emporium-Capwell Company store in Oakland, California, unloaded and put in a storeroom. Subsequently the box was opened and the contents placed upon the store shelves for sale. There is no evidence that during these many handlings the bowl or dish did not sustain some shock or bump which might have caused a defect, with the exception of the testimony of a jobber, who often sold this ware to the store, that if a carton box had been damaged in transit it would be inspected by him and any damaged contents removed; the testimony of the person in charge of the department which handled the ware to the same effect; and the testimony of the plaintiff and her husband that they made a visual inspection when they brought the bowl into their home and found no visible defects. Neither the jobber nor the representative of Emporium-Capwell could say anything about this particular piece of Pyrex ware. Their testimony merely went to their method of handling the ware from manufacturer to consumer. The jobber could not say that he was the particular jobber who sold this particular bowl to the store.

The testimony of both the plaintiff's and defendant's experts is that this glass could break from defects such as a scratch, a chip, a crack, or some internal defect resulting from a bump or shock. The supervisor of the testing department of the defendant testified that a deep scratch might not affect the durability of a dish, whereas a slight scratch might cause it to break. If this be so, it is in the realm of possibility that in the casual visible inspection made by plaintiff and her husband of the dish after they brought it home they may have overlooked some apparently slight defect, which subsequently caused the break. When they received the dish from the store it was wrapped. They bought it from a sample and did not examine it until they reached home."

From the facts, the Court drew "Legal Conclusions" which included the following (R. 38-39, 46-48):

"Plaintiff's counsel contends that under the doctrine of res ipsa loquitur she is entitled to recover because she has shown that the breaking occurred through faulty annealing, and that defendant has failed to show proper care upon its part in the manufacture and inspection of its product.

As a primary consideration for this doctrine to be applicable to a case of this kind, all other causes than defendant's negligence must be excluded. In other words, that doctrine can only be applied where the nature of the accident not only supports the inference of defendant's negligence, but excludes all others.

Hubert v. Aztec Brewing Co., 26 Cal. App. (2d) 664, 688.

It is sometimes said that this doctrine does not apply if the particular product involved in reaching the consumer from the manufacturer has passed through other hands.

Gerber v. Faber, 54 Cal. App. (2d) 674.

This statement may or may not go too far, but it is clear that the burden of proof to show careful handling and to exclude any inference of any other cause or causes is upon the plaintiff. Zentz v. Coca Cola, 92 A.C.A. 140. It is difficult to find that plaintiff has sustained this burden of proof. In the many handlings of this article from manufacturer to consumer there is no evidence of how carefully it was done. There is no evidence that the article did not in such transit receive a bump, shock or slight crack or scratch, which weakened it and subsequently led to the breaking."

* * * * * * *

"In the light of the evidence in this case it cannot be said that the common experience of the manufacturer and others in this line of business forms a basis for an inference that if there were a defect it was reasonably certain to put life or limb in peril, or that the accident is of the kind that does not occur unless some one is negligent. These bowls were produced at the rate of twenty-five pieces per minute. The jobber who testified stated that he alone handled fifteen to twenty carloads of this commodity a year, and there were other jobbers beside him who supplied the Emporium-Capwell Company with these goods. There is no evidence in the record that the breaking of this ware ever hurt or injured any one before. None of its ingredients has any explosive properties. While glass is brittle and

will break it is regarded as inherently non-dangerous. The piece involved in this case was simply an open bowl which even if defective and susceptible of breaking would not ordinarily in the nature of things injure or hurt the person handling it.

The question of reasonable care is to be examined in the light of all these considerations. If this article were one which was to be filled with charged water or other liquid, or if it were a chair which if it broke might cause an injury, the degree of care constituting reasonable care involved in the manufacture thereof would, of course, be greater, because a defect in either bottle or chair would be reasonably certain to cause serious harm.

Since, under the circumstances of this case, there was not such reasonable certainty, and since it was shown that during the course of the manufacture of this kind of ware at defendant's plant specimens of each batch were given a thermal test, an abrasion test, a dropping test, a polariscope, and several similar inspection tests, and that such manufacturing was done under a controlled process, so that these tests would speak for all the ware in the batch so tested, to hold defendant liable in this case would be tantamount in my opinion to making a manufacturer an insurer of his product."

Based on the facts, the conclusions reached by the District Court were sound and supported by the authorities. The manufacturer "is in no sense an insurer". (*Dahms v. General Elevator Co.* (1932), 214 Cal. 733, 741. Also *Honea v. City Dairy, Inc.* (1943),

22 Cal. (2d) 614, 140 P. (2d) 369, is controlling. (*Woodworkers Tool Works v. Byrne* (1951), CCA-9, Docket No. 12,548.) It will be observed from the *Honea* case that the California Supreme Court made a thorough review and analysis of the problems involving the breakage of a glass bottle (as distinguished from a container filled with a charged beverage), and, in effect, re-affirmed the California law on the points involved. It is true the defendant there was a bottler as distinguished from the manufacturer of the glassware in our case, but this is a distinction without a difference. The bottler is required to use ordinary care in making his inspections before use of the bottle. It is true the type of inspection required of a bottler and a manufacturer differs, but ordinary care is required in each case and that is a fundamental point in the *Honea* case. The defendant bottler produced evidence of the inspection it employed. The Court stated at page 618:

> "The mere breaking of the bottle alone cannot give rise to an inference that defendant was negligent in failing to discover the defect. While the dairy may have had a duty to make on examination of all bottles, whether newly purchased or returned by prior customers, it is not responsible for defects that cannot be found by a reasonable, practicable inspection."

Because of lack of proof, appellant asked the Court below to take judicial notice that defects will not occur unless there is negligence, and that glassware is not ordinarily damaged between the time it left appel-

lee's possession and control—some 3,000 miles away—and the time the breakage occurred weeks later in the hands of appellant as the consumer. On this point we again quote from the *Honea* case at page 620:

> "Nor can the court take judicial notice that glass bottles are not ordinarily damaged or that defects will not ordinarily occur unless the bottler is negligent, for the subject is not a matter of common knowledge."

Since the *Honea* case recognizes that the defect could have been caused by a third person, in effect, appellant asked the Court to accept speculation and conjecture in lieu of proving her case just because the ovenware broke. In this connection we quote further one of the most important (and, to our case, pertinent) statements of the *Honea* case, at pages 620-621:

> "While it may often be a matter of common knowledge that certain articles or substances are not ordinarily rendered defective in the absence of negligence, we cannot say that this is true of glass containers. It has been held that because of the physical characteristics of glass an inference of negligence cannot be drawn from breaking alone." (Cases cited.)

Appellant did not have to buy Pyrex ovenware, but having done so, she was charged with common knowledge that glass is breakable and that each one into whose possession it comes, including the ultimate consumer, must handle it with care. When it broke, then to infer negligence solely on the part of the manu-

facturer placed the burden on the manufacturer of an insurer, encouraging carelessness and abuses on the part of jobbers and retailers. After all, they also should continue to have duties to those who purchase from them. No retailer should with impunity sell a defective product known to him to be defective but not observable by the inexperienced eye of the consumer and escape liability to the detriment of the manufacturer. No retailer should even consider himself relieved of the duty to inspect on the theory that his dereliction would be passed on to the manufacturer as an insurer. Apparently some such theory as that explains why appellant did not sue the retailer and the jobber and require them to set forth the methods they employed to establish reasonable care in the inspection and handling of the ware. If they had been sued, at least they might have been liable for breach of implied warranty of quality under the uniform sales act. (California Civil Code, Section 1735.)

The Court below cites *Gerber v. Faber* (1942), 54 Cal. App. (2d) 674, 129 P. (2d) 485, where plaintiff was cut when a bottle of root beer burst. He was the ultimate consumer. Between him and the defendant bottler, the product had passed through the hands of a distributor and a retailer. Judgment went against plaintiff, even in this, a charged beverage case, where there was faulty proof as to transit. We quote at pages 685-686:

> "When, therefore, it becomes incumbent upon plaintiff to establish negligence other than by application of the doctrine of res ipsa loquitur, be-

> cause the proof does not show exclusive control in the defendant, he must go all the way with his evidence and prove some act or omission on the part of the defendant or defendants upon whom he would fasten responsibility. A contrary rule would upset many settled rules of evidence in negligence cases."

Thus in the *Gerber* case, the testimony of the distributor was that the bottle was in his truck for a week, with no evidence that (p. 686) "the bottle had been handled *carefully* during that time or during the process of its delivery to defendant Faber, nor by the latter or his employees when it was placed in the cooler." To relate the lack of evidence in that case to the lack of similar evidence in our case seems unnecessary. The Court also states at page 686:

> "The res ipsa loquitur doctrine cannot be applied so as to raise an inference that the bottle was cracked while in defendant's possession, to the exclusion of the inference that it may have been cracked thereafter."

The Court below also cites *Zentz v. Coca Cola Bottling Co.* (1949), 92 Cal. App. (2d) 130 (Rehearing and California Supreme Court hearing denied, 135), which is of interest in describing the *burden on appellant* in showing that the ovenware received careful handling in transit and elsewhere from the time it left appellee's possession and control until the accident occurred. The *Zentz* case, at pages 134-135, quotes and comments on an instruction from *Gordon*

v. Aztec Brewing Co. (1949), 33 Cal. (2d) 514, 203 P. (2d) 522, as follows:

> "A defendant is deemed to have control at the time of the alleged negligent act although not at the time of the accident, provided plaintiff first proves that the condition of the instrumentality had not been changed after it left the defendant's possession. The defendant is not charged with the duty of showing that something happened to the bottle after it left its control and management. In order to be entitled to the benefit of the doctrine of res ipsa loquitur, the plaintiff must show that *every person who moved or touched the bottle* after it left the control of the defendant, did so with due care, and that during said time the bottle was not accessible to extraneous harmful forces."
>
> * * * * * * *
>
> "The question, therefore, was not left to the jury, but under the instruction, as here given, the court told the jury that '* * * from the happening of the accident involved * * * there arises an inference that the proximate cause * * * was some negligent conduct on the part of the defendant.' Such is not the law. (Honea v. City Dairy, Inc., supra.) We must conclude, therefore, that the giving of the general instruction without a sufficient explanatory instruction, was prejudicially erroneous." (Emphasis ours.)

Going to other jurisdictions, we cite the case of *Slack v. Premier-Pabst Corp.* (1939), 40 Del. 97, 5 Atl. (2d) 516. There plaintiff was an employee of a retailer and when serving a customer a bottle of

beer, made, bottled, sold and distributed by defendant, a bottle exploded before any attempt was made to remove the cap. Judgment was for the defendant. We quote the following pertinent paragraphs from page 519:

> "Glass is a highly inelastic substance, and although it does not become weakened through age alone, yet it is a brittle material, and may become weakened through the application of some physical force. Moreover, the sudden expansion or contraction of its surfaces, sufficient to cause cracks or breaks therein, due to abrupt changes of temperature is a well known physical phenomenon. It is common knowledge that bottled beverages are transported and handled with abandon. It will not do, we think, to say that, as the bottle exploded, inferentially some one was negligent; nor, by a process of exclusion, to permit an inference of negligence to fall upon the bottler after the commodity has passed out of his control. The bottler of carbonated or fermented beverages is not an insurer. There is room in cases such as this for the recognition of the doctrine of unavoidable accident. The existence of negligence is not an ineluctable conclusion. But conceding, arguendo, that negligence on the part of some one must be inferred, the plaintiff must prove facts from which, as a logical probable and reasonable deduction, the negligence of the defendant is inferred. Its existence cannot be a matter of surmise or conjecture.
>
> The count of the declaration questioned by demurrer charges no more than that the plaintiff,

without fault on his part, was injured by the bursting of a bottle of beer bottled by the defendant. Proof of the facts alleged would leave to mere speculation the true cause of the occurrence. It is no more probable that the defendant's negligence was the cause of the explosion and resulting injury, than was the negligence of others who had the management, supervision and control of the bottle after it had been delivered safely by the defendant. In such case, the plaintiff must fail. See Law v. Gallagher, Del. Sup. 197 A. 479."

We also cite *Piehl v. Albany Ry.,* 51 N. Y. Supp. 755, affirmed 162 N. Y. 617, 57 N. E. 1122. While this case dates back to 1898, it was cited as authority by the California Supreme Court in the *Honea* case. A flywheel burst and a fragment killed plaintiff's intestate. Among other things, the plaintiff contended that the fact that the flywheel burst is of itself presumptive evidence of negligence. The Court declined to go along with this, and stated at page 757:

"Such are the limitations upon human foresight that every reasonable care does not always prevent accidents and that such is the nature of steam and electricity and of the engines by or upon which they operate that when such an explosion occurs our experience, or even expert experience, is not sufficiently uniform to justify us in presuming that negligence is the cause. To punish the defendant because it cannot explain the cause of the explosion is not to punish it because it has done wrong, but may be because it does not know what we wish to find out. * * *

> Its bursting was a single unusual and exceptional circumstance. The unexpected happened. When a power magazine in a thickly inhabited locality explodes, the expected does happen."

We also refer the Court to another case, *Coralnick v. Abbotts Dairies,* 337 Pa. 344, 11 Atl. (2d) 143. A summary of the facts and the holding in this case is given at page 621 of the *Honea* case, and therefore we refrain from commenting further upon it.

We also cite the case of *Stodder v. Coca-Cola Bottling Plants* (Maine, 1946), 48 Atl. (2d) 622. Plaintiff, the operator of a restaurant, was putting a coca-cola bottle in the refrigerator when it burst in her hands. The plaintiff relied upon the doctrine of *res ipsa loquitur,* which the Court declined to consider, stating that the negligence must be shown and that the defendant is not an insurer. The Court said at page 624:

> "It must not be a question of conjecture. The circumstances of the accident must indicate negligence. (Citing authorities.) If there are several reasons why the accident may have happened, for some of which the defendant would be liable, the jury is not at liberty to guess which reason caused the accident. (Citing authority.) Where, in a negligence case there are two or more possible causes and the true cause is conjectural, 'the Court cannot, and a jury should not, select.' (Citing authority.)
>
> In this case the instrumentality, viz., the Coca-Cola bottle, was not, at the time of the accident,

> in the possession of the defendant or under the defendant's control. It was in the possession and control of the plaintiff. The plaintiff contends that it should be considered as in control of the defendant, because it had so recently been in the possession of the driver of defendant's truck and there had been no change in circumstances. If the rule, that the instrument should be in the control of defendant, can be changed 'for a few minutes,' why not for a longer period?"

We also refer the Court to *Great Atlantic & Pacific Tea Company v. Kennebeck Water District* (1943), 140 Maine 166, 34 Atl. (2d) 729. The defendant water company installed a meter on plaintiff's property. The bottom of the meter came off and extensive water damage resulted. The Court commented that there was no adequate explanation for the accident. Plaintiff rested its case on *res ipsa loquitur*. The Court stated:

> "The rule does not apply as the accident was caused by a defect in an instrumentality not discoverable on reasonable inspection and for which fault the defendant was not responsible, even though such instrumentality may have been in use by defendant and under its control."

In *Biddlecomb v. Haydon* (1935), 4 Cal. App. (2d) 361, at 364, the holding is that the rule of *res ipsa loquitur* does not apply

> "where the cause of the accident is unexplained and might have been due to one of several causes, for some of which the defendant is not responsible." (Cases cited.)

In *Hubbert v. Aztec Brewing Co.* (1938), 26 Cal. App. (2d) 664, 688, the court quoted from *Lucid v. E. I. DuPont etc. Powder Co.,* 199 Fed. 377:

> " 'The doctrine of res ipsa loquitur involves an exception to the general rule that negligence must be affirmatively shown, and is not to be inferred, and the doctrine is to be applied only when the nature of the accident itself, not only supports the inference of the defendant's negligence, but excludes all others.' "

We also quote from 22 *American Jurisprudence* at page 214, as follows:

> "The decided weight of authority is to the effect that the rule of res ipsa loquitur is not applicable to the bursting or exploding of a container in which an ordinarily harmless commodity is sold."

With regard to this quotation we repeat what we stated above, namely, that the breakage of glass in our case is the same as the breakage of a glass bottle containing a harmless, uncharged commodity.

From the foregoing, it will be observed that, in general, the doctrine of *res ipsa loquitur* is not applicable to the mere breakage of glass. Nor, in addition, could appellant invoke the doctrine, for the Court below held that there was a total lack of evidence that any care at all was used in handling the piece of glassware while in transit, or elsewhere, between the time it left appellee's possession and control and the time the accident happened. In the language of the cases, "In order to be entitled to the

benefit of the doctrine of *res ipsa loquitur,* the plaintiff must show that every person who moved or touched the (ovenware) * * * did so with due care and that during said time the (ovenware) was not accessible to extraneous harmful forces."

Furthermore, the rule of *res ipsa loquitur* does not apply where "the cause of the accident is unexplained and might have been due to one of several causes, for one of which the defendant is not responsible." Or to put it another way, speculation and conjecture could not be resorted to in lieu of legal proof fixing responsibility upon appellee. For any one of these reasons, therefore, appellant could not recover, and accordingly the Court found (R. 52):

> "6. The evidence failed to support plaintiff's allegation that Corning Glass Works was negligent and careless in the manufacture and construction of said baking dish."
>
> * * * * * * *
>
> "10. Plaintiff failed to prove that said baking dish had not changed in any respect after it left the possession of defendant Corning Glass Works at its factory in Corning, New York, and prior to said baking dish breaking while being washed by plaintiff in Berkeley, California, as aforesaid."

There can be no question but what the above quoted findings are sound. (Rule 52, Rules of Civil Procedure.) Nothing appears in the record to the contrary. Appellant has not questioned them on this appeal. They show that appellant failed to prove the charging allegations of her complaint and therefore had no case against the appellee, either for actual negligence or

res ipsa loquitur. Consequently, appellant could not have been prejudiced by the District Court's refusal to set aside her waiver of trial by jury when the record shows that she did not make out a case and could not have gotten to the jury for a verdict. A motion for involuntary dismissal would have been granted to withdraw the case from the trier of the facts.

II.

THE DISCRETION OF THE DISTRICT COURT IN REFUSING TO SET ASIDE WAIVER OF TRIAL BY JURY WAS NOT ABUSED.

The Seventh Amendment of the Federal Constitution has not been violated merely because the District Court followed Rule 38, Rules of Civil Procedure, as promulgated by the Supreme Court. The notes of the Advisory Committee on the Rules of Civil Procedure make it clear that this question was carefully considered before Rule 38 was adopted as part of Title 28, United States Code. These notes show that the Advisory Committee regarded the rule as providing for the preservation of the constitutional right of trial by jury as directed in the enabling act of June 19, 1934; 48 Stat. 1064; Title 28, U.S.C.A., Section 2072, formerly Section 723(c). It was pointed out that Rules 38 and 39 make definite provision for claim and waiver of jury trial, following the method used in many American states, in England and in the British Dominions. Also, it was shown that the demand for jury trial must be made at once, either on initial pleading or appearance in some states, includ-

ing Illinois, Tennessee and Wyoming, or within ten days after the pleadings are completed and the case is at issue, as required by other states, including Connecticut, Massachusetts and Michigan, as well as Hawaii, England and Ontario, or at a definite time varying under different codes from ten days before notice of trial to ten days after notice, or, as in many states, when the case is called for assignment, as required by Arizona, California, Iowa, Nevada, New Mexico, New York, Rhode Island, Utah, and Washington, and under certain provisions of the laws of England, Australia, Alberta, British Columbia and New Brunswick.

In the Commentaries to Rule 38, the following appears:

> " 'Some contention has been made that the right to trial by jury is not preserved within the meaning of the United States Constitution if the party is required to do an affirmative act in order to avoid being deprived of that right. The seriousness of this objection is doubtful, however, in view of the fact that similar provisions in state codes have been upheld.' Daniel K. Hopkinson, 23 Marq. L. Rev. 159."

Rule 38, which is part of the Judicial Code as enacted by Congress, has been considered many times by the Courts in connection with the point raised by appellant. In *Ettelson v. Metropolitan Life Ins. Co.* (C.C.A. 3, 1943), 137 Fed. (2d) 62 (Certiorari Denied, 320 U.S. 777), the Court said at page 65:

> "Basic issues formerly triable as of right by a jury are still triable by a jury as a matter

of right. Rule 38, 28 U.S.C.A. following section 723c."

In *Hargrove v. American Cent. Ins. Co.* (C.C.A. 10 1942), 125 Fed. (2d) 225, the Court said at page 228:

> "Under the Federal rules of civil procedure, which are made expressly applicable, rule 57 F.R.C.P., there is but one form of civil action, in which the right of a trial by jury is recognized and adequately preserved. (Citing authorities, including Pacific Indemnity Co. v. McDonald (C.C.A. 9, 1939), 107 Fed. (2d) 446, 448.)"

In *Arnstein* v. *Twentieth Century Fox Film Corporation* (U.S.D.C., N.Y. 1943), 3 F.R.D. 58, the Court struck out a demand for a jury, and said at page 59:

> "Rule 38 of the Rules of Civil Procedure, 28 U.S.C.A. following section 723c, prescribes the steps to be taken for assuring enjoyment of the right to a jury trial, if such right exist; but that rule did not create the right. The source of the right is the law (constitutional and statutory) as it stood preceding the adoption of the rules.
>
> Subdivision (d) of Rule 38 provides that a failure by a party 'to serve a demand' as required by the rule and to file it in the Clerk's office 'constitutes a waiver by him of trial by jury.' The importance, therefore, of complete conformity with the rule is manifest."

In *Fitzpatrick v. Sun Life Assur. Co. of Canada* (U.S.D.C., New Jersey 1941), 1 F.R.D. 713, the Court

again struck out a demand for a jury, and said at page 716:

> "The right of trial by jury is neither extended nor restricted but is preserved inviolate under the rules."

In the most recent case reported prior to the writing of this brief, the United States District Court for the Western District of Louisiana, in *Bouis v. Aetna Casualty & Surety Co.* (decided June 18, 1951), 98 Fed. Supp. 176, reiterated the point at page 177:

> "The Rules of Federal Procedure, No. 38, preserve the right of jury trial under the Seventh Amendment, but, for practical reasons, specify the manner in which it shall be exercised in order to carry out the principal purposes of those rules to simplify and expedite the procedure of the federal courts."

Thus we see that Rule 38 is as its title implies, the applicable rule of procedure for a jury trial, which in no way alters the substantive right of trial by jury. In this connection, appellant seems to concede that procedures may be changed so long as substantive rights are unaltered, and that is exactly what has occurred in the promulgation of Rule 38 by the Supreme Court of the United States pursuant to statute.

Apparently this Court has had a prior opportunity to consider the question of the trial Court's discretion in refusing to set aside a waiver of trial by jury. In *Johnson v. Gardner* (1949), 179 Fed. (2d)

114 (Certiorari Denied, 339 U.S. 935), a trustee in bankruptcy sued the bankrupt and others to set aside alleged fraudulent conveyances of real property as well as for an accounting of rents collected, for money judgment, for costs and other appropriate relief. On February 10, 1948, the defendants filed a joint answer denying fraud and alleging validity of the conveyances, and praying that title be decreed vested in defendants other than defendant bankrupt, and that the plaintiff take nothing, with the defendants being awarded costs. On November 23, 1948, the case was called for trial and for the first time the matter of a trial by jury was brought up. Apparently a panel of prospective jurors was in attendance "as the result of a recent demand made subsequent to the period prescribed by Rule 38". The plaintiff objected to a trial by jury as required by the defendants and the Court ruled that the same had been waived, excusing the panel in attendance. The trial proceeded and resulted in a decision in favor of the trustee as to the fraudulent conveyances and costs, and in favor of the defendant bankrupt as to an accounting. The remaining defendants then appealed solely on the issue of whether or not the Court erred in refusing to set aside the waiver of trial by jury.

This Court held that the case was one in equity to remedy the wrong wrought by fraud and consequently a jury was not required. However, as we read the opinion of the Court, this Court held that had the case been a proper case for a trial by jury upon a timely demand, nevertheless the record "posi-

tively shows that any original right to a jury trial had been irrevocably waived" (p. 117). As to setting aside a waiver, this helpful dicta is stated on page 118:

> "But of course there is what might be called a 'saving clause' in Rule 39(b) of the Federal Rules of Civil Procedure which may warrant the court to order a trial by a jury although the movant therefore may have waived his right to such mode of trial by failure to comply with the mandatory provisions of Rule 38. A motion under Rule 39(b) is however addressed to the discretion of the court and we cannot say in light of the record before us that the action of the trial judge in the court below in declining to call a jury to try the case amounted to an abuse of judicial discretion. Delno v. Market Street Ry. Co., 9 Cir., 1942, 124 F. 2d 965."

In so holding, this Court cited a number of prior decisions sustaining waivers of trial by jury. In *Fidelity & Deposit Co. v. Krout* (C.C.A. 2, 1946), 157 Fed. (2d) 912, the pleadings had been amended to conform to proof. Defendants' attorney was given an opportunity of additional time to prepare his defenses but the offer was declined and an exception to permitting the amendment relied on. On appeal it was argued that the allowance of the amendment deprived the defendant of trial by jury. As to this argument, the Court said at page 914:

> "The action as brought originally was triable by a jury and the amendment changed nothing in that respect. Failure to claim the right in

accordance with Rule 38(b), Federal Rules Civil Procedure, was a waiver under subdivision (d) of that rule."

Another case that was cited is *May v. Melvin* (U.S.C.A., D.C., 1944), 141 Fed. (2d) 22, where the plaintiff had brought suit for alienation of affections. Plaintiff failed to demand a jury pursuant to Rule 38, and subsequently made such a demand about sixteen months after the defendant's answer was filed. Plaintiff's demand was denied and no request was made to the Court to set aside the waiver under Rule 39. A trial was had and the defendant recovered judgment. On appeal the plaintiff urged error because of being denied trial by jury. The Appellate Court affirmed, saying at page 22:

"Appellant offered no excuse except the 'inadvertence' of former counsel. Though the court might, in its discretion, have ordered a jury trial, it was under no obligation to do so."

A third case that was cited is *William Goldman Theatres v. Kirkpatrick* (C.C.A. 3, 1946), 154 Fed. (2d) 66, where the petitioner sought mandamus to compel respondent judges to vacate an order referring petitioner's suit, as plaintiff under the antitrust laws, against Loew's, Inc., et al., to a special master and refusing petitioner a jury trial on the issue of damages. The suit was at issue on November 15, 1943, with no timely demand for jury being made thereafter. After a trial and an appeal which resulted in the Appellate Court remanding the case

to determine damages, the plaintiff had then petitioned that the trial as to damages be by jury. The petition was denied, with the matter being referred to the special master as hereinabove stated. On appeal the Court held at pages 68 et seq.:

> "We come therefore to the second question, whether Judge Kirkpatrick's refusal to grant the petitioner a jury trial on the issue of damages constituted an abuse of discretion.
>
> * * * * * * *
>
> It will be observed that under the rule the granting of a jury trial rests within the discretion of the district court.
>
> * * * * * * *
>
> We are of the opinion that the issue of damages may be disposed of more efficiently and more expeditiously by a trial to the court rather than by a trial by a jury. Consequently, we conclude that the learned District Judge did not commit a breach of discretion in denying the petitioner's application for a jury trial."

Also cited was *McNabb v. Kansas City Life Ins. Co.* (C.C.A.-8, 1943), 139 Fed. (2d) 591, which was a suit on contract. Plaintiff had not served demand for jury as required by Rule 38. Thereafter plaintiff demanded a jury but did not petition to set the waiver of jury trial aside. The demand for trial by jury was denied and the defendant prevailed in the ensuing trial. Plaintiff appealed, urging the denial of plaintiff's demand for trial by jury as reversible error. The Appellate Court held otherwise, stating at page 595:

> "Rule 38 (d) specifically provides that the failure of a party to serve the required demand constitutes a waiver by him of a trial by jury. Failure to serve such a demand is a legal waiver, *whether it is inadvertent* or intentional." (Emphasis ours.)

The *McNabb* case appears to be a leading case and is cited and quoted at length in a number of cases, including *Baker v. General Motors Corp.* (U.S.D.C., Mich., 1950), 10 F.R.D. 512, where, in a patent infringement case, plaintiff had demanded a jury about sixteen months after the defendant's answer was filed and about six months after the case had been set for trial. Recognizing that the delay in itself did not deprive the Court of discretion to grant plaintiff's demand, the Court nevertheless denied the same (page 514) because "the ends of justice would be better served by not allowing a jury trial" in that type of case.

As shown by the quotation from the opinion of this Court, this Court also cited *Delno v. Market St. Ry. Co.* (C.C.A.-9, 1942), 124 Fed. (2d) 965, where the trial Court had exercised its discretion to dismiss a suit for declaratory relief brought by a disapproving bondholder after the Railroad Commission had approved a plan for refinancing the railroad which included reducing the interest rate and extending the maturity date of the bonded indebtedness five years. In affirming, this Court had occasion to define discretion and abuse of discretion at page 967:

"In a second sense, and the one most commonly meant in the use of the word in the law, 'discretion' is defined as: 'The power exercised by courts to determine questions to which no strict rule of law is applicable but which, from their nature, and the circumstances of the case, are controlled by the personal judgment of the court.' L. Bouv. Law Dict., Rawles' Third Revision, p. 884. Judicial action—discretionary in that sense—is said to be *final and cannot be set aside on appeal except when there is an abuse of discretion.* A common example is a court's ruling on the extent of cross-examination. *Alford v. United States,* 282 U.S. 687, 694, 51 S. Ct. 218, 75 L. Ed. 624. Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful or unreasonable, which is another way of saying that *discretion is abused only where no reasonable man would take the view adopted by the trial court.* If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion." (Emphasis ours.)

Kass v. Baskin (U.S.C.A., D.C., 1947), 164 Fed. (2d) 513, appears to be another leading case on this subject. There suit was originally filed in the Municipal Court, District of Columbia, as a landlord-tenant problem, with the landlord recovering judgment. The appellate division of the Municipal Court reversed, and the United States Court of Appeals allowed an appeal. The rules of the Municipal Court require that a demand for jury "be filed not later than the time for appearance of the defendant" un-

less extended by the Court. Defendant's time for appearance was March 25, 1946. The defendant appeared and secured a continuance of the case for trial but did not demand a jury or request an extension of time for that purpose. *Four days later* defendant filed an answer and a motion for jury trial supported by an affidavit. The trial Court denied the motion, heard the case without a jury and gave the plaintiff judgment. Defendant's appeal followed, with the Appellate Court sustaining the trial judge, and saying at pages 515, et seq.:

> "The affidavit of the attorney in this case shows nothing more than failure to observe the Rule.
>
> * * * * * * *
>
> The literal effect of non-compliance with the Rule is to remove trial by jury from among the rights of the parties and to place it within the sound discretion of the trial court.
>
> * * * * * * *
>
> We hold that if a party fails to observe the conditions of this clear and reasonable rule of court, it is not necessary, in order to apply the consequences of the rule to him, to show that he consciously intended to incur those consequences.
>
> * * * * * * *
>
> The recurrence of the problem makes advisable a clear and certain statement of the applicable rule. We hold that when a party has failed to comply with the requirements of the Rule in respect to demands for jury trial, and thereafter appeals to the court to grant such trial, the *matter lies within the sound discretion of the*

court. In exercising that discretion, the court may consider all elements pertinent to the interests of both parties and also to the general conduct of the business of the court. The sole exception, if any, to this general rule should be, as we have indicated, the case where uncontrollable circumstances prevent compliance with the terms of the Rule; there the right may perhaps be preserved.

Our present holding is consistent with our decision and opinion in May v. Melvin, where the same question was before us under Rule 38(b) of the Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c.

* * * * * * *

We do not find that the trial judge abused his discretion in denying trial by jury when he found no circumstances indicating the advisability of such trial in the interest of justice.

* * * * * * *

Uncontrollable circumstances preventing compliance might perhaps preserve the right, but neglect, whether excusable or not, cannot." (Emphasis ours.)

In so holding, the Court also cited a number of the cases hereinabove discussed and cited by this Court. In addition there is cited *Kennedy v. David* (U.S.C.A., D.C., 1940), 109 Fed. (2d) 676, where a similar factual situation had occurred in the Municipal Court except that the delay in demanding the jury was just four days but more than one month after the time for the appearance of the defendant. Upon plaintiff's objection to trial by jury because

of the failure to make a timely demand, the Court denied the demand and, after trial, gave plaintiff judgment. In affirming the trial Court, the Appellate Court said at page 676:

> "It has long been settled that a right to jury trial in a civil action may be waived by failure to comply with reasonable conditions."

As did the *Kennedy* case, the *Kass* case also cited *Bank of Columbia v. Okely,* 17 U.S. 235, where the Court said at page 243:

> "But a power is reserved to the judges to make such rules and orders 'as that justice may be done;' and as the possession of judicial power imposes an obligation to exercise it, we flatter ourselves that in practice the evils so eloquently dilated on by the counsel do not exist. And if the defendant does not avail himself of the right given him, of having an issue made up, and the trial by jury, which is tendered to him by the act, it is presumable that he cannot dispute the justice of the claim. That this view of the subject is giving full effect to the seventh amendment of the constitution, is not only deducible from the general intent, but from the express wording of the article referred to. Had the terms been, that 'the trial by jury shall be preserved,' it might have been contended that they were imperative, and could not be dispensed with. But the words are, that *the right of trial by jury shall be preserved,* which places it on the foot of a lex pro se introducta, and *the benefit of it may therefore be relinquished."* (Emphasis ours.)

Also cited is *Fidelity & Deposit Co. v. United States,* 187 U.S. 315, where the Court said at page 320:

> "If it were true that the rule deprived the plaintiff in error of the right of trial by jury, we should pronounce it void without reference to cases. But it does not do so. It prescribes the means of making an issue. The issue made as prescribed, the right of trial by jury accrues."

Also cited is *Capital Traction Co. v. Hof,* 174 U.S. 1, where, in passing on the question of the statutes covering jury trial in Justice's Court in light of the Seventh Amendment, the Court said at page 22:

> "While, as has been seen, the Seventh Amendment to the Constitution of the United States requires that 'the right of trial by jury shall be preserved' in the courts of the United States in every action at law in which the value in controversy exceeds twenty dollars, and forbids any fact once tried by a jury to 'be otherwise reexamined, in any court of the United States, then according to the rules of the common law,' meaning thereby the common law of England, and not the law of any one or more of the states of the Union, yet it is to be remembered that, as observed by Justice Johnson, speaking for this court, in Bank of Columbia v. Okely, above cited, it is not 'trial by jury', but 'the right of trial by jury', which the Amendment declares 'shall be preserved.' *It does not prescribe at what stage of an action a trial by jury must, if demanded, be had; or what conditions may be imposed upon the demand of such a trial, consist-*

ently with preserving the right to it. In passing upon these questions, the judicial decisions and the settled practice in the several states are entitled to great weight, inasmuch as the Constitutions of all of them had secured the right of trial by jury in civil actions, by the words 'shall be preserved', or 'shall be as heretofore', or 'shall remain inviolate', or 'shall be held sacred', or by some equivalent expression." (Emphasis ours.)

Also cited is *Duignan v. United States,* 274 U.S. 195, where the Court said at page 199:

"Appellant's failure to demand a trial by a common law jury amounted, we think, to a waiver of the constitutional right, if any, now claimed."

Also cited is *Yakus v. United States,* 321 U.S. 414, where the Court said at page 444:

"No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it."

Also cited is *Prince Line v. American Paper Exports* (C.C.A. 2, 1932), 55 Fed. (2d) 1053, where the Court said at page 1057:

"The respondent was bound at that time to claim its right to a jury, if it meant to insist upon it: for a jury trial is not in civil cases, a constitutional necessity; *a defendant may lose it by inaction.*" (Emphasis ours.)

In an appeal from a conviction arising out of kidnapping where a question of jurisdiction was raised because the Sixth Amendment of the Constitution conferred on the accused the privilege of trial by jury of the district where the crime was committed, the Court, in *United States v. Strewl* (C.C.A. 2, 1938), 99 Fed. (2d) 474, pointed up the difference between waiver of a jury in a civil case by failure to make timely demand, and the requirement that in criminal cases a jury must be expressly waived by the accused, saying at page 478:

> "That privilege may indeed be surrendered, because the privilege of any trial by jury whatever may be surrendered. Patton v. United States, 281 U.S. 276, 50 S. Ct. 253, 74 L. Ed. 854, 70 A.L.R. 263.
>
> * * * * * * *
>
> It is true that under rule 38(d) of the Rules of Civil Procedure for District Court, 28 U.S.C.A. following section 723c, he who does not seasonably demand a jury may not have one, whether he consents or not; and it is also true that the Seventh Amendment, U.S.C.A. Const. Amend. 7, protects that privilege, just as the Sixth protects it in a criminal case."

As authority, the *Strewl* case cites *Patton v. United States,* 281 U.S. 276, where the Supreme Court said at page 299:

> "Since, however, the right to a jury trial may be waived, it would be unreasonable to leave the court powerless to give effect to the waiver and itself dispose of the case. We are of opinion that

> *the court has authority in the exercise of a sound discretion to accept the waiver,* and, as a necessary corollary, to proceed to the trial and determination of the case with a reduced number or without a jury; and that jurisdiction to that end is vested by the foregoing statutory provisions." (Emphasis ours.)

Where the plaintiff failed to make timely demand for trial by jury and subsequently a demand was denied with judgment being entered for the defendants following a Court trial, the Court, in *Missouri Pac. Transp. Co. v. George* (C.C.A.-8, 1940). 114 Fed. (2d) 757 (Certiorari Denied, 312 U.S. 681), held that the trial Court had not erred in denying plaintiff's motion for a jury trial, stating at page 758:

> "Further, the record does not show that the plaintiff served its demand for a jury trial upon the other parties to the suit or that it indorsed such demand upon its pleadings as provided in Rule 38(b) of the Rules of Civil Procedure, 28 U.S.C.A. following section 723c, subsection (d) of which rule provides that: 'The failure of a party to serve a demand as required by this rule * * * constitutes a waiver * * * of trial by jury.' "

Where the issue of the validity of a patent in an infringement case was tried without a jury and resulted in the defendant having judgment, and on appeal the plaintiff urged, among other grounds, that there was error in not trying the issue of validity before a jury, the Appellate Court in *Gasifier Mfg. Co. v. General Motors Corporation* (C.C.A.-8, 1943). 138 Fed. (2d) 197, said at page 199:

> "The contention of the plaintiff that the court erred in not having the issue of invalidity tried by a jury, is without merit. The record does not show that there was any demand for a jury trial, and, under Rules 38(d) and 39(b) of the Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c, the case was properly tried as a jury-waived case."

Where plaintiff sued for specific performance of a contract and "such other relief as the court may deem proper" and subsequently moved to amend the prayer of the complaint to include damages with the motion being denied, together with plaintiff's subsequent motion to conform the pleadings to proof, resulting in the trial Court granting defendant's motion for an involuntary dismissal, the Court, in *Gulbenkian v. Gulbenkian* (C.C.A.-2, 1945), 147 Fed. (2d) 173, said at page 176:

> "Clearly the defendants had long been on notice of the plaintiff's potential claim for damages. If jury trial was ever claimable, the defendants' failure to claim it, whether intentionally or inadvertently, was a waiver."

In *Roth v. Hyer* (C.C.A.-5, 1944), 142 Fed. (2d) 227 (Certiorari Denied, 323 U.S. 712), plaintiff sued for damages for breach of contract. Because of a failure to make timely demand for trial by jury, the case was tried by the Court who gave judgment to the defendants. On appeal a reversal occurred and the case was sent back for "further and not inconsistent proceedings". At the second hearing defendants de-

manded a jury. The trial judge refused the demand, holding that nothing but the issue of damages remained. Damages were awarded with the Court rejecting the plaintiff's theory of damages. Both parties then appealed. The Appellate Court held that the defendant should have moved for a jury under Rule 39 since a jury had already been waived under Rule 38 in the first trial, saying at page 228:

> "We accordingly hold that there was no error here on the retrial in refusing the demand for a jury trial. But it may happen that a judge on a retrial may think best to have a jury, and by Rule 39(b) in such a case *the Court in its discretion upon motion may order a trial by jury, though there is no longer a right to demand one.*" (Emphasis ours.)

The *Roth* case was subsequently cited in *Albert v. R. P. Farnsworth & Co.* (C.C.A.-5, 1949), 176 Fed. (2d) 198, which also involved a suit on a contract with the defendant failing to make a timely demand for a jury. Judgment went for the plaintiff and the defendant appealed, urging the denial of a jury trial as reversible error. The Appellate Court reversed on other grounds, stating as to the matter of a trial by jury at page 203:

> "As to the motion for trial by jury, while the right to a jury in a federal court, as declared by the Seventh Amendment is a basic and fundamental feature of our system, we are of the opinion that, because of the lateness of the demand, denial was not error."

In *Abbe v. New York, N. H. & H. R. Co.* (C.C.A.-2, 1948), 171 Fed. (2d) 387, a personal injury action filed in the State Court had been removed to the Federal Court where the answer was filed on May 15, 1948. Short of a month the plaintiff was notified that the case had been placed on the nonjury calendar for trial and thereupon moved to transfer the case to the jury calendar. The motion was denied and an appeal followed. The Appellate Court held that the order was interlocutory and not appealable and that consequently the appeal had to be dismissed. Judge Learned Hand dissented, stating that he would favor considering the appeal as an application for a writ of mandamus, and in this connection said at page 389:

> "On the merits the order ought to be affirmed, for it is clear on this record that the judge did not abuse the discretion given him by Rule 39(b).

In the following cases, a demand for trial by jury was stricken because the same had not been served within ten days after the last responsive pleading:

Steinhardt Novelty Co. v. Arkay Infants Wear (U.S.D.C., N.Y., 1950), 10 F.R.D. 321, 323;

Reeves v. Pennsylvania R. Co. (U.S.D.C., Md., 1949), 9 F.R.D. 487, 488;

Bullock v. Sterling Drug (U.S.D.C., Pa., 1948), 8 F.R.D. 575;

Steiger v. Mullaney (U.S.D.C., N.Y., 1948), 8 F.R.D. 486;

Gora v. Jenkins Bros. (U.S.D.C., Conn., 1948), 8 F.R.D. 32;

Irvine v. Luckenbach Steamship Co. (U.S.D.C. N.Y., 1946), 7 F.R.D. 127, 128.

A.

Unfamiliarity with Rule 38 is insufficient to set aside waiver of trial by jury.

Appellant asked the District Court to set aside her waiver of trial by jury because such waiver was "due to the inadvertence and mistake of affiant as plaintiff's counsel" (R. 25). In substance, the asserted inadvertence and mistake was in fact nothing more than unfamiliarity with the rules of procedure. In *State of Delaware v. Massachusetts Bonding & Ins. Co.* (U.S.D.C., Del., 1942), 3 F.R.D. 65, the Court held that unfamiliarity with the rules of procedure was insufficient grounds to require the setting aside of a waiver of trial by jury. Oddly enough, in that case the District Court first granted defendant's motion to set aside the waiver because the Court thought counsel's unfamiliarity was excusable since he "practices in a small community in one of the lower counties of this District, has never had a case in this Court and was unfamiliar with the Federal Rules of Civil Procedure", but on re-argument the order was set aside when it was shown that defendant's appearance was entered by "one of the well-known law firms of Wilmington", a fact not previously known to the Court, the Court saying at page 67:

"In short, in view of the new facts I have little, if anything, upon which to base an exercise of discretion in relieving defendants' waiver of a trial by jury. Hence, their motion for jury trial is denied."

In *MacDonald v. Central Vermont Ry., Inc.* (U.S. D.C., Conn., 1940), 31 Fed. Supp. 298, the Court said at page 299:

"I am also asked to rule upon the validity of the plaintiff's claim of trial by jury. This claim was filed long after the time limited by Rule 38(b). The right to a jury trial was thus waived under Rule 38(d). The plaintiff, in effect, is seeking to withdraw his waiver. The only ground upon which plaintiff's application is based is that in November, 1938, when the pleadings were closed, the plaintiff's attorney was not familiar with the relevant provisions of the new rules and that the rules themselves were not readily available to him in published form.

But the plaintiff brought his action to this Court in October, 1938, after the new rules had become effective. Consequently, the limited exception for pending actions provided in Rule 86 is not applicable here. Certainly the new rules as promulgated and reported to Congress were available in October, 1938, in any reputable bar library. Altogether, even if in a proper case the court has power to relax the rigor of Rule 38(b) (a point which I find it unnecessary to decide) I must rule that the grounds upon which this application is based are inadequate. *One who invokes the jurisdiction of a federal court is charged with notice of the plain language of the rules regulating its procedure.*" (Emphasis ours.)

In *Krussman v. Omaha Woodmen Life Ins. Soc.* (U.S.D.C., Idaho, 1941), 2 F.R.D. 3, plaintiff's attorney failed to make timely demand "by reason of oversight". In refusing to set aside the waiver, the Court said at page 4:

> "The Courts who have interpreted the rule where the discretion was exercised and motion for trial by jury was granted after the time to demand it has elapsed seem to be based upon a showing made disclosing some circumstances other than the bare oversight of counsel.
>
> * * * * * * *
>
> Should the motion be granted, it would have to be based merely on the simple request and nothing more. To do that the Court would be acting arbitrarily which it should not do, and therefore the motion of the plaintiff is denied."

In *Arnold v. Chicago, B. & Q. R. Co.* (U.S.D.C., Neb., 1947), 7 F.R.D. 678, plaintiff filed a personal injury action in the state Court and defendant removed the same, filing its answer in the Federal Court. As in the case at bar, a demand for trial by jury was not timely. In denying a subsequent demand, the Court commented on the difference between State and Federal practice and stated that such was not a sufficient reason to set aside the waiver of trial by jury, saying at pages 679, et seq.:

> "If it be considered, in its literal form, as a demand as of right for a trial by jury upon the theory that the right exists because the case was filed originally in the Nebraska state court, it is without validity. It is unquestioned that the case

is one in which a trial by jury may be demanded in this court by timely action, and that, if it had not been removed from the state court, its trial there would have been had before a jury, unless both parties by stipulation had waived such trial. But those circumstances are not controlling upon the present question.

The case came here with only the petition filed. And the issues were matured in this court. In such situations Rule 81(c) is to be administered. It provides that, 'These rules apply to civil actions removed to the district courts of the United States from the state courts and govern all procedure after removal.'

* * * * * * *

Thus by Rule 81(c), Rule 38, in its several subdivisions, becomes applicable to removed cases. And by Rule 38(b), in association with Rule 6(e), when service of the last pleading directed to the triable issue is by mail, the time within which a jury trial may be demanded is explicitly prescribed. The limitation there declared has not been observed in this instance.

* * * * * * *

It may be added that as a matter of judicial administration *judicial indulgence ought rarely to grant a trial by jury in default of a timely request for it.* Such laxity is calculated to inspire indifference to the requirements of the rules in their entirety, to countenance tardiness in procedural and trial performance, and ultimately to defeat the avowed purpose of the rules to achieve punctuality in the administration of justice. More immediately, it will inevitably create confusion in trial dockets and accomplish unanticipated and in-

tolerable continuances of trials. The consequences are uninviting.

An order is being entered denying the motion." (Emphasis ours.)

In *Bowles v. Samonas* (U.S.D.C., Pa., 1946), 7 F.R.D. 104, a complicated O.P.A. rent case was before the Court. The defendant had moved to set aside the waiver of trial by jury for the reason that counsel had assumed that the procedure in the Federal Court as to trial by jury in civil proceedings was the same as the practice in the State Courts and consequently, through inadvertence and mistake, was unaware that Rule 38 required that a timely demand for a jury be made. In passing on this matter, the District Court observed that when the rules first went into effect, at least one Court had held that the reason given by counsel was "excusable neglect", citing *Albert Hoffmann, Inc. v. Textile Mach. Works,* 27 Fed. Supp. 431. The Court also noted that a contrary view had been expressed by other Courts, of which *MacDonald v. Central Vermont Ry. Inc.,* 31 Fed. Supp. 298, cited supra, is an example. Although the motion was granted on the grounds that the many factual issues made a jury trial advisable, the Court was careful to say that the granting of the motion was "not to be construed as a practice of this Court to make similar rulings where the reason advanced is that counsel * * * is not familiar with the rules". Specifically the Court said at page 105:

"Although the Court realizes that members of the bar in outlying counties do not generally have

> regular occasions to practice in Federal Court, when an attorney is admitted to practice before this Court, *he is charged with the responsibility to learn the rules of practice and procedure* and said rules are available in all law libraries." (Emphasis ours.)

It would seem clear to appellee from the foregoing cases that the reason given by appellant in asking that the Court set aside appellant's waiver of trial by jury is entirely insufficient since apparently it was due solely to appellant's San Francisco counsel being unfamiliar with the Federal Rules in urging inadvertence and mistake. It is well established that in the absence of some compelling showing, unfamiliarity with Rule 38 is insufficient grounds for this Court to set aside a waiver of trial by jury especially where the District Court, in its discretion, has ruled otherwise.

B.

Appellant acquiesced to her day in Court without a jury.

Even if appellant could find some comfort in the authorities indicating that the District Court abused its discretion as a matter of law in refusing to set aside her waiver of trial by jury, the fact that appellant went to trial without demanding a jury at any time after her motion was denied would in itself constitute a final waiver precluding further relief following judgment in favor of appellee. In this connection, the Supreme Court said in *Duignan v. United States,* 274 U.S. 195, at page 198:

> "The right to a jury trial may be waived where there is an appearance and participation in the

trial without demanding a jury. Kearney v. Case, 12 Wall. 275, 20 L. ed. 395; Perego v. Dodge, 163 U.S. 160, 166, 41 L. ed. 113, 117, 11 Sup. Ct. Rep. 971, 18 Mor. Min. Rep. 364."

In *Smith v. Cushman Motor Works* (C.C.A.-8, 1950), 178 Fed. (2d) 953 (rehearing denied), a contract action was before the Court, the defense being that there was no contract. After the issues were framed, defendants apparently made a timely demand for a jury, with plaintiffs having made no such demand. When the case came on for trial the judge stated that the first question was whether there was a contract and this, being a question of law, was one for the Court rather than for a jury, following the determination of which it could be ascertained whether or not a jury was needed. Neither party objected to this ruling. The case proceeded as the Court directed and the Court found for the defendant, holding that there was no contract, and dismissing the jury. Plaintiffs appealed, urging reversible error in not submitting the contract question to a jury, there being no issue as to the sufficiency of the evidence to support the findings much as in the case at bar. In affirming, the Appellate Court said at page 954:

> "The second assignment is that the court committed reversible error in failing to submit to a jury the issue as to the existence of the contract sued on. The answer is that the appellants not only never demanded a jury as required by Rule 38 of the Federal Rules of Civil Procedure, 28 U.S.C.A., but *consented to a trial of the case before the court,* as also did the appellee. Appellants do not argue that the findings of fact of the

trial judge concerning the existence of the contract sued on were clearly erroneous under Rule 52 of the Rules of Civil Procedure. On the contrary, *they take no exceptions to any of the findings* by the trial court; but, admitting that the question of whether there was a contract was a question of fact on which the evidence was in dispute, they insist that the court should have submitted that issue to a jury. *Appellants having waived a trial by a jury are in no position now to complain that the court decided against them* the question submitted to it.

The judgment of the District Court is affirmed." (Emphasis ours.)

In *Fireman's Ins. Co. of Newark v. Smith* (C.C.A.-8, 1950), 180 Fed. (2d) 371 (rehearing denied; certiorari denied, 339 U.S. 980), the trial Court called a jury on its own motion for an advisory verdict on equitable issues. The parties engaged in the trial without objection as to the calling of a jury. The defendants recovered judgment. Plaintiff urged on appeal that the trial Court had erred in calling a jury on its own motion over plaintiff's objection. As to this the Appellate Court said at page 375:

"It follows that the court did not err in calling an advisory jury. It also follows that appellant cannot be heard to complain because it in effect agreed to trial by an advisory jury in that it saved no objection to the jury, but acquiesced in the procedure."

Likewise, in *Hargrove v. American Cent. Ins. Co.* (C.C.A.-10, 1942), 125 Fed. (2d) 225, where the ac-

tion was one for declaratory judgment on a policy, neither party demanded a jury and the Court impaneled an advisory jury with neither party objecting. Also without objection the Court submitted certain interrogatories to the jury which were answered. Thereafter the Court disregarded the jury's verdict and made independent findings, stating that the verdict of the jury was advisory only and so considered by the Court. On appeal it was urged that the Court erred in impaneling an advisory jury and in this connection the Court said at page 229:

> "The insured not only consented to the procedure, but he is not prejudiced thereby and cannot now complain."

Appellant apparently concedes that, prior to the adoption of the Rules of Civil Procedure, a party litigant could voluntarily waive trial by jury by proceeding to trial before the Court without objection for the reason that such constituted a conscientious, intentional and voluntary waiver on the part of the party in question. (A.O.B. 11-17.) We have seen from the foregoing cases that, since the adoption of such rules, the Courts still regard proceeding to trial before the Court alone and without objection as constituting a waiver of trial by jury. In other words, the Rules of Procedure have in no way changed the well-established rule in this regard. Appellant acquiesced to her day in Court without a jury.

C.

The authorities do not support appellant.

Appellant has cited no case, and we have found none, where the District Judge in the exercise of sound discretion refused to set aside a waiver of trial by jury with the Appellate Court reversing because of alleged abuse of discretion. But that is exactly what appellant is asking this Court to do on a record clearly showing no abuse of discretion and with numerous cases holding otherwise as hereinabove cited.

Appellant cites six cases where, without exception, for some special reason the *District Judge in his discretion set aside the waiver of trial by jury.* In *Sofarelli Bros. v. Elgin* (C.C.A.-4, 1942), 129 Fed. (2d) 785 (A.O.B. 18), the case had been removed from the state Court, following which the plaintiff failed to demand a jury. However, at the time of trial the judge exercised his discretion in favor of granting a jury trial on plaintiff's motion for the same. Apparently plaintiff had made a written request to the clerk for a jury trial and the letter so requesting had been lost. Also, ten days before trial, during an argument on the taking of a deposition the matter of a jury trial was mentioned. At any rate, over defendant's objection, the trial judge saw fit to call a jury rather than deny one, and the Appellate Court affirmed, holding that although there was no formal compliance with Rule 38, the rule had been complied with in spirit and the trial judge did not err in exercising his discretion to allow a jury.

In *Container Co. v. Carpenter Container Corp.*, 9 F.R.D. 261 (A.O.B. 18), the District Judge set aside a waiver because of "excusable neglect" arising out of failure to demand a jury within time and prior to the separation for trial of a non-jury patent matter from anti-trust issues raised in a counterclaim, the plaintiff desiring a jury trial of the latter.

In *Paper Stylists, Inc. v. Fitchburg Paper Co.*, 9 F.R.D. 4 (A.O.B. 18), again the District Judge allowed a jury trial due "to the peculiar circumstances involved" arising out of a "maze of legal procedure" causing plaintiff to lose sight of the time within which to demand a jury.

Again, in *Ferris v. Farnsworth Television & Radio Corp.*, 8 F.R.D. 489 (A.O.B. 18), plaintiff had demanded a jury in the state Court before removal, clearly evidencing an intention not to waive the same, and then neglected to repeat such demand thereafter. The District Judge set aside an apparent waiver, not because plaintiff had any right to a trial by jury in the opinion of the Court, but, in the exercise of the Court's discretion, the Court felt that the failure to make timely demand was excusable in view of the demand previously filed in the state Court.

Where similar facts were presented in *Wardrop v. New York Life Ins. Co.*, 1 F.R.D. 175 (A.O.B. 19), a similar ruling was handed down by the District Judge, holding that it was not necessary to repeat the demand made in the state Court prior to removal. It should be noted in passing that nothing would have prevented appellant from endorsing such a demand

on her complaint when she filed it in the state Court knowing that she was suing and serving a foreign corporation which was entitled to remove the case to the Federal Court.

Again in *Gruskin v. New York Life Ins. Co.*, 1 F.R.D. 22 (A.O.B. 19), plaintiff brought suit in the state Court where right of trial by jury existed without demand—unlike our own state Court practice where a jury must be demanded when filing a memorandum to set the case for trial or it is waived by the party filing the memorandum. On removal, counsel failed to make a timely demand in the Federal Court. The District Judge set aside the waiver because, in the opinion of the Court, counsel did not realize that the Rules of Civil Procedure which "had not been in operation for a long period", replaced the state rules, otherwise, "the delay in the instant case was such as to preclude the Court from exercising its discretion in favor of the motion".

There is no case holding that where the District Judge refuses, in his discretion, both before and after a Court trial, to act to set aside a waiver of trial by jury, such in itself constitutes reversible error. There must be a showing of an abuse of that discretion. There has been no such showing in this case.

CONCLUSION.

Not only was there no error in the refusal of the District Court to set aside appellant's waiver of trial by jury, but, in addition, the record shows that appel-

lant could not have been prejudiced because she failed to prove her case, requiring that a motion for involuntary dismissal be granted to withdraw the case from the trier of the facts. The record also shows no compelling reason in law or in fact why the Court below should have granted appellant's motion to set aside the waiver of trial by jury. We contend that reversible error has not been committed and that the judgment of the lower Court should be affirmed.

Dated, San Francisco, California,
October 8, 1951.

Respectfully submitted,
HADSELL, MURMAN & BISHOP,
SYDNEY P. MURMAN,
RICHARD S. BISHOP,
Attorneys for Appellee.